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OFFICE OF PETITIONS

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In re Application of Clevenger et al. :
Application No. 10/817,179 : Decision on Petition
Filing Date: April 2, 2004 :
Attorney Docket No. YOR920010518US1 :

This is a decision on the petition under 37 CFR 1.137(b), filed September 6, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

The above-identified application became abandoned for failure to submit the issue fee and publication fee in a timely manner in reply to the Notice of Allowance mailed May 4, 2006, which set a statutory period for reply of three (3) months. Accordingly, the above-identified application became abandoned on August 5, 2006.

A grantable petition under 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply,
- (2) the petition fee,
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

Petitioner has filed a Request for Continued Examination under §1.114 (and RCE Fee) and submission (an amendment) as the proposed reply. However, in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

37 CFR 1.137(c) states,

In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must include payment of the issue fee or any outstanding balance. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

Both 35 U.S.C. 41(a)(7) and 151 require payment of the issue fee as a condition of reviving an application abandoned or patent lapsed for failure to pay the issue fee. A reply that serves to continue prosecution in an application, such as an RCE, is not sufficient to satisfy either §151 or 41(a)(7). The Commissioner does not have the authority to waive these statutory requirements.

The petition contains an authorization to charge any necessary fees under 37 CFR 1.16 or 1.17 to petitioner's deposit account. However, an issue fee is a fee under 37 CFR 1.18. A transmittal letter contains a general authorization to charge fees. However, the Office normally interprets a general authorization to charge fees as covering fees under 37 CFR 1.16 or 1.17. Per MPEP 1306, the payment of the issue fee "must be specifically authorized by reference to the 'issue fee' or 'fees due under 37 CFR 1.18.'"

Petitioner must submit the issue fee for the petition to be revived.

Petitioner is advised that any issue fee paid with a request for reconsideration may be applied towards the issue fee required by a new Notice of Allowance. In order to have the issue fee applied towards any fees required by a future Notice of Allowance, written instructions including such a request must be filed in response to the new Notice of Allowance.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are permitted.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
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Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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